Supreme Court, U. S.
FILED
FEB 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–164

PASADENA CITY BOARD OF EDUCATION, et al.,
Petitioners,

vs.

NANCY ANNE SPANGLER, et al.,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS SPANGLER, ET AL.

FRED OKRAND
JILL JAKES
MARK D. ROSENBAUM
MARY ELLEN GALE
ACLU Foundation of
Southern California
633 South Shatto Place
Los Angeles, Ca 90005
(213) 487-1720

Attorneys for Respondents Spangler, et al.

PEOPLE'S LOBBY PRESS, LOS ANGELES

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

QUESTIONS 2

STATEMENT 3

SUMMARY OF ARGUMENT 28

ARGUMENT 32

I. THE COURT BELOW PROPERLY DENIED THE MOTIONS TO MODIFY THE PASADENA PLAN AND TO RELIEVE THE PASADENA BOARD OF EDUCATION OF THE INJUNCTION AGAINST OPERATING A SEGREGATED SCHOOL SYSTEM 32

A. The Pasadena School District Is Not and Has Not Been A Unitary System 34

B. Petitioners' Opposition To The Pasadena Plan Was A Factor The Trial Court Had The Duty To Take Into Account In Its Decision As To Whether The District Should Be Relieved Of The Court's Order 39

C. The Trial Court Properly Disallowed The Free Choice Modification Proposed By Petitioners 46

II. THIS CASE IS NOT MOOT 61

CONCLUSION 77

TABLE OF AUTHORITIES

CASES

PAGE

Bing v. Broadway Express, Inc., 485 F.2d 441 (CA 5 1973) 69

Black v. Cutter Laboratories (1956), 351 U.S. 292 27

Board of Sch. Commissioners of the City of Indianapolis v. Jacobs (1975), 420 U.S. 128 71

Boykins v. Fairfield Bd. of Educ., 421 F.2d 1330 (ca 5 1970) 58

Bradley v. School Board (1965), 382 U.S. 103 19

Brinkman v. Gilligan, 503 F.2d 684 (CA 6 1974) 47

Brown v. Board of Education (1954), 347 U.S. 483 ..... 49, 51

Brown v. Board of Education (1955), 349 U.S. 294 ..... 47, 48, 49, 70

Calhoun v. Cook, 522 F.2d 717 (CA 5 1975) 36, 38

Cato v. Parham, 403 F.2d 12 (CA 8 1968) 57

Clark v. Bd. of Educ. of Little Rock Sch. Dist., 426 F.2d 1035 (CA 8 1970), *cert. den.* 402 U.S. 952 58

Comstock v. Group of Institutional Investors (1948), 335 U.S. 211 39

Cook v. Hudson, 511 F.2d 744 (CA 5 1975), *pet. for cert. pending*, # 75-503 17

Cooper v. Aaron (1958), 358 U.S. 1 ..... 52, 53

Cruz v. Hauck (1975), 515 F.2d 322 72

Davis v. Bd. of Sch. Commissioners of Mobile County (1971), 402 U.S. 33 ..... 54, 59

Doherty v. Wilson, 356 F.Supp. 35 (MD Ga 1973) 40

Gerstein v. Pugh (1975), 420 U.S. 103 64

Goss v. Bd. of Educ. of Knoxville (1973), 373 U.S. 683 51

Green v. Sch. Bd. of New Kent County (1968), 391 U.S. 430..... 46, 47, 49, 52, 55, 59

Guerra v. Manchester Terminal Corp., 498 F.2d 641 (CA 5 1974) 69

Hall v. St. Helena Parish Sch. Bd., 424 F.2d 320 (CA 5 1970) 58

Hart v. Community Sch. Bd. of Educ., 512 F.2d 37 (CA 2 1975) 45

Higgins v. Bd. of Educ., 508 F.2d 779 (CA 6 1974) 45

Hilson v. Ouzts, 421 F.2d 632 (CA 5 1970) 58

Hilson v. Ouzts, 425 F.2d 219 (CA 5 1970) 58

Jackson v. The Marvel Sch. Dist. No. 22, 416 F.2d 380 (CA 8 1968) .. 57

Jacobs v. Bd. of Sch. Commissioners, 349 F.Supp. 605 ..... 71, 72

Jiminez v. Weinberger, 523 F.2d 689 (CA 7 1975) 70, 72

Johnson v. San Francisco Unified Sch. Dist. (1974), 500 F.2d 349 ... 39

Jones v. Alfred H. Mayer Co. (1968), 392 U.S. 409 33

Kelly v. Guinn (1972), 456 F.2d 100, *cert. den.*413 U.S. 919 56

Keyes v. Sch. Dist. No. 1 (1973), 413 U.S. 189 ..... 45, 53

Mapp v. Bd. of Educ., 525 F.2d 169 (CA 6, Oct. 20, 1975) 36, 38

McDaniel v. Barresi (1971), 402 U.S. 39 45

Milliken v. Bradley (1974), 418 U.S. 717 32

Monroe v. Bd. of Commissioners (1968), 391 U.S. 450 .....46, 50, 52 55, 59

Moore v. Ogilvie (1969), 394 U.S. 814 65

Morales v. Shannon, 516 F.2d 411 (CA 5 1975) 47

North Carolina Bd. of Educ. v. Swann (1971), 402 U.S. 43 ..... 44, 76

Pasadena City Bd. of Educ. v. Spangler, No. A-538, USSC, Oct. Term 1975, *dec'n pending* 61-62

Raney v. Bd. of Educ. of the Gould Sch. Dist. (1968), 391 U.S. 443 .....35, 46, 49 55, 59, 70

Reitman v. Mulkey (1967), 387 U.S. 369 51

Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (CA 5 1974) 64

Rogers v. Paul (1965), 382 U.S. 198 70

San Francisco Unified Sch. Dist. v. Johnson (1970), 3 Cal.3d 937, 92 Cal.Rptr. 309, 479 P.2d 669, *cert.den.* 401 U.S. 1012 16

Santa Barbara Sch. Dist. v. Superior Court (1975), 13 Cal.3d 315, 530 P.2d 605, 118 Cal.Rptr. 637 53

Singleton v. Board of Commissioners of State Institutions, 356 F.2d 771 (CA 5 1966) 73

Smith v. Texas (1940, 311 U.S. 128 ... 33

Soria v. Oxnard Sch. Dist. Bd. of Trustees (1973), 488 F.2d 579 39

Sosna v. Iowa (1975), 419 U.S. 393 65

Spangler v. United States, 415 F.2d 1242 (CA 9 1969) 66, 73, 75

Spangler v. Pasadena City Bd. of Educ., 427 F.2d 1352 67

Spangler v. Pasadena City Bd. of Educ., 519 F.2d 430 37

Steele v. The Bd. of Public Instruction of Leon County, 421 F.2d 1382 (CA 5 1970) 58

Storer v. Brown (19749, 415 U.S. 724 65

Swann v. Charlotte-Mecklenburg Bd. of Educ. (1971), 402 U.S. 1 ..... 19, 27, 32, 33, 34, 41, 44

Toglianetti v. United States (1969), 394 U.S. 316 65

United States v. Bd. of Educ. of Baldwin County, 423 F.2d 1013 (CA 5 1970) 58

United States v. Bd. of Educ. of Webster County, 431 F.2d 59 (CA 5 1970) 58

United States v. Breitling (1958), 20 How. (U.S.) 252, 15 L.ed. 900 ... 65

United States v. Choctaw County Bd. of Educ., 417 F.2d 838 (CA 5 1969) 58

United States v. Georgia, 466 F.2d 197 (CA 7 1972) 58

United States v. Greenwood Municipal Separate School Dist., 406 F.2d 1086, *cert. den.* 395 U.S. 907 ..... 16, 20, 44

United States v. Jefferson County Bd. of Educ., 417 F.2d 834 (CA 5 1969)..... 57-58

United States v. Lovett, 416 F.2d 386 (CA 8 1969) 59

United States v. Midland Independent Sch. Dist., 519 F.2d 60 (CA 5 1975) 47

United States v. Montgomery County Bd. of Educ. (1969), 395 U.S. 225... 18

United States v. School Dist. of Omaha, 521 F.2d 530 (CA 5 1975), *cert. den.* 44 U.S. Law Week 3280

United States v. Swift & Co. (1932), 286 U.S. 106 33

Wright v. Council of the City of Emporia (1972), 407 U.S. 451 51

STATUTES

Civil Rights Act of 1964 74-75

42 U.S.C. 2000c-6 75

2000h-2 ..... 66, 74, 75

2000h-3 75

Equal Educational Act of 1974, 20 U.S.C. 1709 *et seq.* 42

Federal Rules of Civil Procedure, Rule 23 ..... 31, 65, 69

California Education Code, § 1009.6 52

MISCELLANEOUS

Hearings before Subcommittee No. 5 of the Comm. on the Judiciary, House of Representatives, 92d Cong. 13

Karst and Horowitz, "Emerging Nationwide Standards for School Desegregation -- Charlotte and Mobile, 1971," 1 The Black Law Journal 206 (1971) 51

44 Modern Federal Practice Digest, 1973 Cumulative Ann. Pocket Parts, Key No. "Schools & School Districts" 154 58

United States Commission on Civil Rights, Southern School Desegregation 1966-67 (1967) 57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–164

PASADENA CITY BOARD OF EDUCATION, et al.,
Petitioners,

vs.

NANCY ANNE SPANGLER, et al.,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENTS SPANGLER, ET AL.

OPINIONS BELOW

In addition to the opinions cited by petitioners, other opinions involving this case are reported at 415 F.2d 1242, 427 F. 2d 1352, and 384 F.Supp. 846.

QUESTIONS

Respondents are not satisfied with petitioners' formulation of the questions presented for review and therefore, pursuant to Rule 40(3) of this Court, present the following:

1. Where a decree holding that a school board is guilty of de jure segregation has become final, and a portion of the decree required the board to remedy the discrimination by not allowing more than a certain percentage of a minority in any school, may the Board later on certiorari attack the validity of the decree?

2. Where a school district found to have been guilty of de jure segregation has failed to become unitary, and where it is capable of complying with the Court's decree, may the trial court require the district to become unitary before it relieves the district of judicial control or of that portion of its remedial decree not allowing more than a certain percentage of a minority in any school in the district?

3. Does a trial court abuse its duty

under Brown II, or otherwise abuse its discretion, when it refuses to allow a de jure segregated school district which has not become unitary to adopt a plan which will place the district in the same or virtually the same segregatory position it was in when the litigation was started which led to the decree requiring the board to desegregate?

STATEMENT

With due respect, petitioners argue a case which is simply not before this Court. This is a de jure segregation case. Petitioners have not made the district unitary; until they do, the Constitution does not permit them to either go it alone or be relieved of the decree, good faith compliance with which holds promise for making the district unitary.

On January 23, 1970, the district court entered its judgment (Appx. 3-4)[1]

[1] "Appx." refers to the Single Appendix filed herein pursuant to this Court's Rule 26.

enjoining the members of the board "from discriminating on the basis of race in the operation of the Pasadena Unified School District" (Appx. 3) and requiring them to adopt a plan that "shall include programs for the assignment, hiring, and promotion of teachers and other professional staff members in such a manner as to reduce racial segregation throughout the District. The plan shall include procedures to be followed and goals to be attained in connection with the location and construction of facilities, both permanent and transportable, that will reduce racial segregation in the District. The plan shall provide for student assignments in such a manner that, by or before the beginning of the school year that commences in September of 1970 there shall be no school in the District, elementary or junior high or senior high school, with a majority of any minority students."

This order was made pursuant to findings of fact pointing unerringly to the segregated school system fostered and maintained by the Board. *E.g.*:

In the assignment of students the Board assigned white students living in the proximity of black schools, Cleveland and Lincoln, to a "white" school, Linda Vista (Appx. 100-01); when this latter school was closed for repairs, the school district transported Linda Vista children three miles across the Colorado Freeway to another "white" school although five majority "black" schools were closer to Linda Vista, three of them having more unused capacity than San Rafael (Appx. 101); the students from Linda Vista were assigned to attend three "white" junior high schools but never the nearest junior high, Washington, which was "black"; in addition, Washington has had more black students than the four other regular junior high schools in any year for which records are in evidence (Appx. 101); in the attendance zones drawn between the District's two largest elementary schools, the Board assigned those living in a white residential area, most of which was close to the "black" Washington School, to the 97% white Longfellow School, and then to the 99.9% white Altadena School although Altadena

was overenrolled and Washington was underenrolled (Appx. 103); ten years later, to relieve overcrowding at Longfellow which by then had become 88% white, the Board assigned the students to Webster and Burbank, both of which were over 97% white, Webster itself being overenrolled (*ibid.*); and the Board relieved the then overcrowding at Washington not by assigning the students to Altadena, but by adding still another, an *eighth*, transportable (*ibid.*); neither "white" Altadena nor Longfellow had transportables that year (*ibid.*).

In the high schools, the Board manipulated attendance so as to increase the number of white students in the "white" schools and the number of black students in the "black" schools (Appx. 105).

Although the Board and the District's chief administrative officers recognized the need for integration of the District's schools since at least 1958, they took no steps toward that end beyond adopting an "open enrollment" or "free choice" plan

which permitted a small number of both black and white students to escape black schools (Appx. 106).

And the Board consistently voted against proposals which would have led to integration (Appx. 106-7) although it knew that under California law it had the duty to do so (Appx. 107). In the matter of dis tricting, the Board assured that the two "white" high schools would have no more than 24% black students but placed no limitation on the "black" high schools (Appx. 108); at the junior high level, the Board made attendance zone changes so that four of them, the "white" junior highs, would have an enrollment of no more than 30% black, but took no such steps with regard to the "black" junior high (Appx. 108-9); and at the elementary level the Board adopted a program to insure that schools with less than 30% black enrollment would continue to have predominantly white enrollment (Appx. 109).

The Board used transportation to make it possible for white children to avoid attending schools with a greater percentage

of black students (Appx. 109).

All this resulted in 85% of the District's black elementary students attending eight majority black schools, while 93% of its white elementary students attended the other 21 schools (Appx. 99); in some schools having as much as 80 or 90% black students, with one, Cleveland Elementary, having seven white students in an enrollment of 542 (*ibid.*); at the junior high level, in almost one-half (49%) of the black students attending one school (Appx. 99-100); similarly, in 48% of the District's black students attending one high school (Appx. 100).

As to the assignment of teachers and staff, the Board conducted itself similarly vis-a-vis segregation. Thus, there has never been a black teacher, administrator, or other certificated employee in five of the "white" elementary schools, only one in two others for but one year, and in the current year, but four in the ten elementary schools located in the east "white" area of town (Appx. 112). For every year figures were available, beginning in 1951, only 50% of the black certificated em-

ployees on the elementary level were assigned to schools having over 50% black students (*ibid.*), and for the last three years over 80% of the black certificated employees were assigned to majority black schools, while in the last year, only five of the 88 certificated black elementary employees were assigned to the 15 elementary schools where black enrollment was less than 10% (Appx. 112). No black teachers, administrators or other certificated personnel were assigned to three of the five junior high schools until after 1960-61 (Appx. 112); for the last three years over half of the black certificated junior high employees have been assigned to one school, Washington, which has been over 75% black, and there still is but one black teacher at Wilson Junior High (*ibid.*).

The District has never had a black principal at any school on the "white" east side (*ibid.*) and there has never been a black principal or assistant principal at any majority white elementary school (Appx. 113); the District has only two

black principals out of 37; no high school has ever had a black principal (Appx. 117); and the District has never had a black person as superintendent, assistant superintendent or director of a department (*ibid.*). Black teachers are assigned by and large to black schools (*ibid.*), and the District's practice is to assign less well educated, less experienced and lower paid teachers to majority black schools more frequently than to majority white schools (Appx. 114). In the hiring of teachers there has been active discrimination against black applicants (Appx. 115-16), and qualified black administrators were repeatedly passed over to the extent that in their frustration they left the District (Appx. 117-18).

There is but one black nurse out of 27. She was first assigned to Pasadena High, a "white" school, but was replaced by a white nurse and transferred to Cleveland and Franklin elementary schools, 90% and 68% black, respectively (Appx. 114); the explanation was that she "could make a better contribution and would be an asset to the northwest [black] community" (*ibid.*)

Similarly in the matter of construction, rehabilitation and the closing of schools, did the Board engage in segregatory conduct. Even at the time of trial, construction plans of the Board would intensify segregation and impose greater burdens on black students than on white (Appx. 119-20). In addition, the Board placed transportable classrooms at overenrolled black schools while adjoining white schools had fewer transportables or none (Appx. 121-22). And the Board maintained overcrowded black schools while adjoining white schools were underenrolled (Appx. 122-23).

In its transfer policy the Board granted transfers that it knew were racially motivated and that intensified racial segregation in the schools (Appx. 125). In explaining its failure to integrate students, teachers and staff, the Board pointed to its neighborhood school policy and a policy against forced busing (Appx. 98).

In the face of this record, it was incumbent, of course, upon the trial court to issue an order that would desegregate the Pasadena schools. This

it did. (Appx. 3.) And the "Pasadena Plan" was submitted. (Appx. 6.) But that is only the beginning of the story. Petitioners' suggestion (Br. 4) that the mere fact that the plan was implemented at the beginning of the school year, September 1970, made the District unitary, is clearly without substance. While at that moment the no-majority-of-any-minority requirement was in effect, it takes more than one swallow to make a spring. That ratio feature was only one part of the Pasadena Plan, not the least of which, we would think, would be a good faith effort to make it work. As we shall see, the petitioners now before this Court failed in that regard, as well as in others.

Petitioners' assertion (Br. 5) "that the record shows no actions by the school board in derogation of the Plan's effectiveness" is incorrect. A brief resume will demonstrate. Following the judgment requiring Pasadena schools to desegregate (Appx. 3), the majority of the then Board voted not to appeal it (Exh. I, Appx. 271-72). In retaliation, petitioner Marcheschi sought to recall those members of the

Board who had voted not to appeal, and to be elected to the Board himself (Exhs. III-V, Appx. 272-81). Mr. Marcheschi and his two running mates made clear they were running on a platform of resistance to the district court's order which had enjoined the Board and its members "from discriminating on the basis of race in the operation of the Pasadena Unified School District" (Appx. 3). It is this which the Board and its members resisted in their arduous defense of the case. And it was the reversal of this constitutional imperative that the recallers sought to achieve. Despite the clear evidence in the record to the contrary, they refused to concede that the Pasadena schools were segregated or that the Board had had anything to do with the segregation that was extant in them and pretended that it was just happenstance. Thus, Mr. Marcheschi in May 1972, testifying in Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 92d Congress, on Proposed Amendments to the Constitution and Legislation Relating to Transportation

and Assignment of Public School Pupils [p. 1417], said (Appx. 491):

> "Pasadena has *always* maintained a unitary school system, and to the extent racially imbalanced schools existed, as indeed they did, they existed primarily as a result of housing patterns." (Emphasis added.)

This, in the face of such blatant conduct on the part of the Board as, for example, creating a "Geographic and Controlled Open District," a device that resulted in the transportation of black students who lived across the street from one high school to another school (Appx. 105). Or assigning white students to a white school further away from their homes than closer black schools with capacity to take them (Appx. 101).

In their efforts to recall those of the Board members who had had the temerity of voting to abide by the Court's order and get on with the business of complying with the Constitution instead of continuing the turmoil and engaging in court battle, the recallers, including the president of the Board at the time of the

trial of the present proceedings, made clear their view that mandatory pupil assignments to achieve the Constitution's goal were not to be countenanced. Thus Mr. Marcheschi told the voters, "Involuntary integration is self-defeating. It will not work!" (Pl. Exh. VI, Rep. Tr. 162, 163.)[2] And he promised that "neighborhood schools will be restored in the Pasadena School District hopefully by January 1971, certainly by September, 1971"[3] (Pl. V, Appx. 279), and that "children will go to school where they live -- in their neighborhood schools" (*ibid.*); that "minority children will be encouraged and assisted to attend schools outside their neighborhood IF THEY VOLUNTARILY DECIDE TO DO SO" (*ibid.*, Appx. 280).[4]

---

[2] "Rep. Tr." refers to the Reporter's Transcript of the trial.

[3] Thus evidencing a clear intent that there be *no* desegregation in Pasadena.

[4] Missing from the appeal to the voters was the suggestion that white students would be encouraged to attend schools outside their neighborhood.

And the slogan "STOP Forced Busing" was a hallmark of the campaign. (Pl. Exh. III, Appx. 273.)[5]

While Mr. Marcheschi failed in his efforts in 1971 to recall the members of the Board and to be elected himself, he was elected to the Board at the next regular election, and from that post he continued in his efforts. He presented, on November 9, 1971 (Rep. Tr. 164-65), "The New Pasadena Plan" (Pl. Exh. VIII, Appx. 570), the principal feature of which was a system of "free choice" for the parents of black children as to whether the children wanted to "attend integrated schools in the White community or majority Black schools located in the Black community" (Pl. Exh. VIII, Appx. 572).

---

[5]It will be remembered that the trial court had found the Board to have used the neighborhood school policy and policy against forced busing, plus an open enrollment or free-choice plan, and that those policies result in segregation and in increasing segregation. (Appx. 98, 105, 107.) Apropos petitioners' "STOP Forced Busing" outcry, there is nothing in the Pasadena Plan which *requires* a student to take a bus to school. (*Cf.* San Francisco Unified Sch. Dist. v. Johnson (1970), 3 Cal.3d 937, 92 Cal.Rptr. 309, 479 P.2d 669, *cert. den.* 401 U.S. 1012.) This is of some significance, we believe, in light of the fact that the proposed alternative plan of petitioners envisaged as much or more busing than the Pasadena Plan (Appx. 458, 492).

To make attendance in the black community more attractive, the caveat was appended that those schools would be "under Black control" (*ibid.*).

The next election, March 6, 1973, saw a slate of candidates running on the same platform as Mr. Marcheschi's in 1970. These persons, Richard Vetterli, Henry Myers, Jr. and Lyman Newton, the petitioners now before this Court, ran on a platform which included "stop forced busing of students and return them to neighborhood schools." (Pl. Exh. XIII, Appx. 286; see also Pl. Exhs. XII, Appx. 285; XIV, Appx. 290; XVI, Appx. 294.)[6] And Mr. Marcheschi supported them. In a Vote-O-Gram to the voters, he said: "Must elect Vetterli,

---

[6]The campaign literature on behalf of Mr. Newton stated: "'He and his wife have three children . . . Only Lori attends a public school in the Pasadena School District. The other two children attended public schools until the busing issue forced them out of their neighborhood,' said Newton." (Pl. Exh. XIII, Appx. 288.) *Cf.* Cook v. Hudson, 511 F.2d 744 (CA 5 1975), *petition for cert. pending # 75-503.*

Myers and Newton to join me on school board. Essential we re-establish neighborhood schools...." (Pl. Exh. XVII, Appx. 296.) That slate won, leaving the board composed of four persons opposed to positive integration and in favor of "free choice," and one, Sam Sheats, supporting the Court's order. (Appx. 456.)

Virtually immediately upon taking office, the three new members reorganized the administrative set-up of the District. It will be remembered that among the discriminations practiced by the former members of the Board was discrimination in hiring and promoting administrative personnel (Appx. 117). To remedy that situation, the Court's order required the plan to "include programs for the assignment, hiring, and promotion of...professional staff members in such a manner as to reduce racial segregation throughout the District." (Appx. 3.)[7]

---

[7]This was, of course, an appropriate order. This Court has recognized that to achieve "a public school system wholly free from racial discrimination," desegregation of the staff is an important ingredient. United States v. Montgomery County Bd. of Educ. (1969), 395 U.S. 225, 231-32. *See also*

To this end the Pasadena Plan submitted by the then Board (Appx. 5), approved by the Court on March 10, 1970 (Appx. 96), included specific provision for the hiring and promotion of administrative personnel. Under the heading "Recruitment and Selection of Administrators," (Appx. 54-55) the Plan provides for a positive effort to be made to attract and recruit minority administrators to the District. Extensive advertising of available positions was to be engaged in, including sending announcements to the college and university placement offices in Southern California, and also to a mailing list recommended by the Department of Intergroup Education, which includes agencies and districts where minority personnel may be available. The Plan required that all applicants who meet the minimum eligibility requirements were to be admitted to the examination and that all appointments had to be approved by the Superintendent. The plan took pains to make clear its intent that mere passive conduct in the search for minority

---

Bradley v. School Board (1965), 382 U.S. 103. Indeed discrimination in staff is "among the most important indicia of a segregated system." Swann v. Charlotte-Mecklenburg Bd. of Educ. (1971), 402 U.S. 1, 18.

personnel was not to be tolerated.[8] Thus:

> "A positive recruitment program paralleling the teacher recruitment program will actively seek out minority group administrators, supervisors, and counselors who are interested in employment with the Pasadena Unified School District. As a part of this recruitment program, bulletins concerning job opportunities will be sent to college and university placement offices and other professional organization offices. In these bulletins, minority candidates will be especially encouraged to apply." Appx. 55.

None of the procedures was followed in the July 10, 1973 appointments by the Board, on a 3-2 vote, of three new administrators (Appx. 320, 514-16). Two Acting Assistant Superintendents and an Acting Director of Elementary Curriculum were appointed without notice and without approval of the Superintendent; and all, predictably, were Caucasian. (Pl. Exh. XX, Appx. 317-21, 516.)

---

[8] The Constitution permits no less. "The school board must put its shoulder to the wheel and assume the burden of integrating the faculty and staff...." United States v. Greenwood Municipal Separate School District, 406 F.2d 1086, 1093, *cert. den.* 395 U.S. 907.

In addition, the Board thereafter, on July 31, 1973, with only Mr. Sheats objecting, appointed two Caucasion principals -- also without following the recruitment procedures outlined by the Pasadena Plan. (Appx. 517-18.)

Although professing to be concerned about the diminishing white student population (Pet. Br. 5), when a request was made to the Board by a white segment of the District for leave to withdraw from the District, Mr. Marcheschi voted to allow it to de-annex. (Appx. 330, 489-90.)

A further example of the petitioners' conduct with which the Court was faced in connection with its decision as to whether to allow a modification of the Pasadena Plan or to declare the District unitary and relieve it of federal court jurisdiction, was the petitioners' failure to continue the Black and Mexican-American Task Forces (Appx. 494). The purpose of those task forces, in the words of Mr. Marcheschi (Appx. 493), was to provide a communicative link between the board and those identifiable segments (*i.e.*,

black and Mexican-American) of the community. The last time there were these task forces was the year ending June 1973. (Appx. 494.) So, upon petitioners' taking office, the minority task forces ceased to exist.

And even as to its treatment of its one black member, the petitioners discriminated, giving the four Caucasian members specific spheres of influence but allowing Mr. Sheats none (Appx. 524-25).

Accordingly, contrary to petitioners' assessment (Br. 5), the record shows continued action by the Board in derogation of the Plan's effectiveness.

Though conceding, as they must, that a declining white population was not unique to Pasadena (Br. 5), petitioners nevertheless subtly suggest that but for the Pasadena Plan, this would not have occurred. (Br. 25.) This is simply contrary to fact. Even before the 1970 judgment, the phenomenon of declining white population and increasing minority population had been occurring in Pasadena. The Board recognized it in its very presentation of the Pasadena Plan (Appx. 8):

> "Ethnic imbalance in certain schools of the Pasadena Unified School District has increased in recent years....
>
> "In the past seven years, the main factor contributing to the increase of Negro students in certain schools has been the immigration of large numbers of Negroes in certain housing areas of the Pasadena school district, and the emigration of Anglo-Caucasians.
>
> "...The number of Anglo-Caucasian pupils decreased from 22,463 to 17,859 during this same period 1962-1969 , a drop of 4,604 students. The percentage declined from 73.8% to 58.3%, or a decrease of 15.5% of the total enrollment. ..."

Indeed, the phenomenon had been going on since 1948 (Appx. 347, 507, 601).

To attribute "white flight", therefore, to the Pasadena Plan is simply without foundation. And the record does not sustain it. Quite the contrary, the phenomenon has been going on throughout California and the nation irrespective of whether there is court ordered or otherwise occurring desegregation (Appx. 393, 347, 562). And to the extent that there

was some increase of white loss just after the Pasadena Plan was instituted, none has been shown to be due to the Plan, other factors being extant at the time in the city. (Appx. 505.) Indeed, after the Pasadena Plan was instituted, there was a slackening of the trend (Appx. 380). This was only the second year since 1965 that that had occurred (*ibid.*) Moreover even Mr. Marcheschi acknowledged that all of the drop could not be attributed to the Pasadena Plan (Appx. 298), and to the extent that it could, the flight was over, the families who ran having already run (Appx. 325, 326, 476). In the words of petitioner Marcheschi, "the brunt of that phenomenon is behind us." (Appx. 47.6.)

With regard to their concern for the achievement of minority children (Pet. Br. 5), petitioners again subtly suggest, that somehow the Pasadena Plan is to blame. (Pet. Br. 6.) Not only is this not the fact, but to the extent that there is evidence on the question, it is that during the time of the Pasadena Plan the black children have not suffered from the cumulative deficit phenomenon. Cumulative

deficit is the term used to describe the phenomenon that minority children, already behind when they start school, tend to get farther and farther behind as they go through school (Appx. 558). Prior to 1970 the black children in the Pasadena schools suffered from this cumulative deficit. (Appx. 558-59.) But since the Pasadena Plan was put into effect, the black children in the system have been growing at the same rate of speed as the white; there has not been any cumulative deficit. (Appx. 559, 564.) Few school districts have achieved that (Appx. 559). In other respects as well, stability, self-esteem and less anxiety, has the Pasadena Plan served the black and the other students of the District (Appx. 547-48).

With regard to one facet of the Pasadena Plan -- that there shall be no majority of any minority in the schools -- petitioners seize (Pet. Br. 7) upon a statement by the trial court during colloquy with counsel (Appx. 270) that that meant that there must be annual reassignments of the students. There is nothing in the record to support that contention. There is no reason why

stable plans cannot be made for many years in the future. And the mere fact that the staff miscalculated once[9] does not mean that they will do so again.[10]

Petitioners are mistaken in their assertion (Pet. Br. 8) that the essential basis for the trial court's rejecting petitioners' motion was its insistence on a decreed racial mix and a distaste for a different busing plan.[11] Faced with a Board whose members had consistently

---

[9]They had taken the trend into account in drawing up the Pasadena Plan in the first place. (Appx. 509.)

[10]We cannot refrain from commenting upon this concern about redistricting. No one seems aghast at this problem when it might have to be done because of overcrowded or under-utilized schools, or when an old school is abandoned or a new one built. It is only for desegregation objectives that the assignment of students becomes insuperable.

[11]No doubt the court would have been pleased had its "lifetime" hope been realized (perhaps we all should), but it recognized (Appx. 456) that that might not be possible -- state and national, as well as Pasadena's, demographic phenomena, perhaps, point in another direction -- but it cannot be faulted, because it also recognized (*ibid.*) that that time had not yet come. In any event, this Court "reviews judgments, not statements in opinions," or, we might add, in colloquy

fought the court's order and not given it the impetus which everyone recognizes--or should--is necessary to make the transition from segregation to integration; faced with a Board whose members the court could not, frankly, trust--any more than it could have, the earlier boards whose members professed integrative intent in the 60's but acted segregatively; faced with a Board whose members blatantly defied the Plan which had been worked out to attempt to get minorities into administrative and executive positions; faced with the testimony of the Superintendent that the Pasadena Plan is preferable to the proposed plan (Appx. 519); and faced with a request from Board members that the District be allowed to go back to a freedom of choice plan and to virtually the same segregative system it had when

---

with counsel. Black v. Cutter Laboratories (1956), 351 U.S. 292, 297. And, to paraphrase this Court in Black, "At times, the atmosphere in which [colloquy takes place] may become so surcharged that unnecessarily broad statements are made." 351 U.S. at 298. Under all the facts in the case, it cannot be said that the trial court abused its discretion or that the Court of Appeals erred in sustaining it. (Swann v. Charlotte-Mecklenburg Bd. of Educ. [1971], 402 U.S. 1, 30.)

this litigation all began, the court did the only thing it could do: deny the motions to allow that to be done. In reality -- in real practical effect -- the case presented to the trial court in January 1974 is essentially as though it had been presented to it in April or May 1970. The specific individual members of the Board had changed, but the Board had not.

SUMMARY OF ARGUMENT

I

Petitioners are in no position to attack the validity of the original judgment requiring the school district to desegregate. That decision is final, and it not having been beyond the jurisdiction of the court to render it, it cannot be collaterally attacked.

II

The Pasadena Unified School District is a de jure segregated school system. Despite the court order for it to become a unitary system, it has not achieved that

status. That being the case, the trial court did not abuse its discretion in refusing to lift judicial control over the district, for the vestiges of past discrimination remain.

In considering whether to dissolve the injunction and allow the Board members to proceed on their own, the trial court had not only the right but the duty to consider that those individuals had opposed the original order of desegregation; had, despite overwhelming evidence to the contrary, refused to recognize that the segregation of the schools in Pasadena was not happenstance but had been designedly effectuated and maintained by the Board, who had vowed that they would not allow "forced busing"; and even from the very first pronouncement of the court's order, were dedicated to the maintenance of the neighborhood school policy, which was one of the main factors in the first instance in the Pasadena District's being a dual and segregated school system. Under these circumstances, it was not an abuse of discretion for the court not to have dissolved the injunction.

III

The alternative plan submitted to the court by petitioners was not a plan which gave promise of desegregating the system and desegregating it now. It was, in essence, a "free choice" plan which predictably would have placed the Pasadena School System back in the very segregated posture it was when the lawsuit was first begun. Pasadena had previously tried free choice plans and they had failed to desegregate the system. Moreover, other school districts in California had tried comparable plans and they, too, had failed to work. Under these circumstances, the trial court did not abuse its discretion in not approving the proposed plan.

IV

The case is not moot. Nor is it moot as to either the plaintiffs-respondents or the United States. The controversy is alive and vigorous.

Although the trial court did not use the very words to declare the action a class action, all the parties to the litigation knew and considered it to be

such, and it was thus tried; in reality, therefore, the Rule 23(c)(1) declaration was made. Moreover, and even had not the class action determination been made, the mere graduation of the named plaintiffs does not moot the case, for this being a race discrimination, school desegregation case, it falls within the "capable of repetition yet evading review" line of decisions of this Court.

In any event, the presence of the United States as party plaintiff-intervenor prevents the case from being moot. The United States had the absolute right to, and did, intervene in the case to desegregate the Pasadena School System. It did this because of the strong public interest in obtaining compliance with the Equal Protection Clause of the Constitution. That public interest did not disappear with the graduation of the named plaintiffs. The class for whose benefit the litigation was carried forward still remains.

***

In sum, the judgment should be affirmed.

ARGUMENT

I

THE COURT BELOW PROPERLY DENIED THE MOTIONS TO MODIFY THE PASADENA PLAN AND TO RELIEVE THE PASADENA BOARD OF EDUCATION OF THE INJUNCTION AGAINST OPERATING A SEGREGATED SCHOOL SYSTEM[12]

It is to be remembered that it is the Board of Education which seeks to be relieved from court supervision altogether, or to be permitted, contrary to the present court order, to institute an alternative or modified plan. It has the burden,

[12]We do not understand how petitioners can now attack the validity of the trial court's 1970 judgment (Pet. Br. 12). That judgment was not appealed. It became final, and that's that. Certainly the judgment was not beyond the jurisdiction of the court. Moreover, petitioners misread the record in this case in their reliance (*ibid.*) on Swann v. Charlotte-Mecklenborg Bd. of Educ. (1971), 402 U.S. 1, and Milliken v. Bradley (1974), 418 U.S. 717. Just as in Swann (402 U.S. at 24), the Board here operated a segregated school system. And, with a variation on Swann, it has not now come forward with an acceptable plan which will insure that the District will not again be so segregated. Accordingly, just as in Swann (at 281), "the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." The

therefore, of showing its entitlement, and that in denying its motion the trial court abused its discretion. United States v. Swift & Co. (1932), 286 U.S. 106, 114. The burden is especially heavy in a school desegregation case where the propensities for evasion by those challenged as to their duty to provide equal protection are an historic truism. Jones v. Alfred H. Mayer Co. (1968), 392 U.S. 409, 448, n. 5, concurring opinion; Swann, *supra*, 402 U.S. at 13.

And it is to be remembered that "the [14th] Amendment nullifies sophisticated as well as simple modes of discrimination." Lane v. Wilson (1939), 307 U.S. 268, 275. For where "there has been discrimination, whether accomplished ingeniously or ingenuously, [it] cannot stand." Smith v. Texas (1940), 311 U.S. 128, 132.

Petitioners are quite in error in their insistence (Pet. Br. 13) that the

question here is whether petitioners have shown enough change since the judgment to warrant the court to relieve them. As we have seen and shall see again, petitioners have simply not carried their burden.

trial court's judgment means "that the Pasadena School district has to be reassigned each year to maintain the existence of its racial balance formula." The judgment says no such thing, nor did the trial court say any such thing.[13] The judgment does mean that petitioners must plan ahead.

A. The Pasadena School District Is Not And Has Not Been A Unitary System.

As previously noted, petitioners' reliance (Pet. Br. 14) on Swann is misplaced. What Swann says is that year by year adjustments of the racial composition of student bodies are not constitutionally required "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." Swann, 402 U.S. at 32. This is simply not

[13] We have discussed above, fn. 11, p. 26, petitioners' seizure on the colloquy between the Court and counsel wherein the Court expressed its expectation for the future.

the case here. A school board which has, for example, discriminated in the assignment of its faculty and staff members and in the hiring of teachers and the hiring and promoting of its administrative personnel (Appx. 112-18), which makes no effort to afford opportunity for minorities to apply -- although its desegregation plan specifically laid out a comprehensive system just for that purpose -- and which appoints, at the very time it is supposed to be desegregating, Caucasians to three top administrative posts and two principalships (Appx. 514, 516, 518), can scarcely lay claim to having eliminated racial discrimination from the system. No more can it lay claim to be allowed to go henceforth on its own.

Again, petitioners are quite in error in their assertion (Pet. Br. 15-16) that the Pasadena Plan has been "'operated in a constitutionally permissible fashion so that the goal of a desegregated, non-racially operated school system [has been] rapidly and finally achieved,'" a requirement which petitioner (Pet. Br. 15) concedes Raney v. Board of Education (1968), 391 U.S. 443, mandates. Not only have they failed to

carry out the Plan as to student assignment, but they have also discriminated in the employment of administrative and staff personnel (Appx. 516, 518).

Petitioners are similarly in error when they say (Pet. Br. 16) that one of the bases for the trial court's denial of their motions is that the demographic changes which caused some schools to fall outside the racial balance formula prevent the school system from being treated as unitary. The Court said no such thing and there is nothing in its opinion (Appx. 452-59) which can give rise to such an inference; nor did the court below (519 F.2d 430).

Accordingly, petitioners set up a straw man in arguing (Pet. Br. 16) that "the demographic changes that caused some schools in the system to fail to maintain the prescribed racial balance do not adversely affect the school system's unitary status," and their reliance on two Court of Appeals decisions, Mapp v. Board of Education, 525 F.2d 169 (CA 6, 1975), and Calhoun v. Cook, 522 F.2d 717 (CA 5 1975), is misplaced. Petitioners

fail to appreciate the thrust of this case and the meaning of the opinion of the court below (519 F.2d at 437):

> "When viewed from the perspective of this long line of Supreme Court authority, we cannot conscientiously hold that the district judge abused his broad equitable discretion in refusing to modify or dissolve his Decree. His decision was primarily based upon his finding that there had not been a full and genuine implementation of his original Order such as would achieve the elimination of racial discrimination 'root and branch.' The directive of the dictum in *Swann* by its very terms becomes operative "once the affirmative duty to desegregate has been *accomplished* and racial discrimination is *eliminated* from the system." 402 U.S. 1, 31-32, 91 S.Ct. 1267, 1284, 28 L.Ed.2d 554 (1971) (emphasis added). On the specific facts of this case as revealed from the record and reiterated *supra*, it was reasonable for the District Court to conclude that full and effective elimination of racial discrimination had not been achieved during the three school years following the initial year in which the Pasadena Plan was in effect. If desegregation was 'accomplished' or 'eliminated' after the implementation of the Pasadena Plan, such was a transitory and temporary achievement, enduring for a period of the utmost brevity."

Mapp recognizes the problem. Thus, at 172 of 525 F.2d, the Court says:

> "...Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty...."

That is precisely what the trial judge did here.

Similarly in Calhoun, the trial court found that the remaining one-race schools in the Atlanta district "are the product of its preponderant majority of black pupils rather than a vestige of past segregation." 522 F.2d at 719. And the Court of Appeals held that those findings were not clearly erroneous. The case at bar is just to the contrary. The trial court found that the vestiges of past segregation still remain, and the Court of Appeals here found that *those* findings are not clearly

erroneous[14] -- as indeed they are not.

So the fact that under different sets of circumstances some courts have allowed predominantly black schools has no bearing on the circumstances in Pasadena. Here there has not been the "full and genuine implementation of [the] original Order such as would achieve the elimination of racial discrimination 'root and branch.'" 519 F.2d at 437. Until that is done, petitioners have no cause for complaint.

B. Petitioners' Opposition To The Pasadena Plan Was A Factor The Trial Court Had The Duty To Take Into Account In Its Decision As to Whether The District Should Be Relieved Of the Court's Order.

There is no doubt that petitioners had and have every right, including a constitutional one, to express their opposition

---

[14]The "two-court" rule is then applicable. Comstock v. Group of Institutional Investors (1948), 335 U.S. 211, 214. The affirmance by the court below is especially significant in light of the fact that the Ninth Circuit has adopted the "purposeful" standard of segregative intent, Johnson v. San Francisco Unified Sch. Dist. (1974), 500 F.2d 349, 351; Soria v. Oxnard Sch. Dist. Bd. of Trustees (1973), 488 F.2d 579, 585. *See* fn. 11 and text thereto.

to the Pasadena Plan and to the court order which required them to refrain from discriminating on the basis of race in the operation of the Pasadena Unifed School District. But one of the beauties of free speech -- communication, if you will -- is that others are entitled to take the speaker at his word, for words portend action.[15]

Petitioners' views on the desegregation of the Pasadena School System are not views that have just come to fruition as a result of sincere efforts to desegregate. Petitioners stand in the shoes of -- indeed, it is as though they are the same persons -- those who fought the court order requiring dismantling of the discrimination, who sought to overturn the court's order, which goal if successful in 1970 would have meant that the racially discriminatory school system would have continued on its merry way. Even in the face of the record made in court, petitioners refused to acknowledge that the District had been guilty of racial discrimination (Appx. 491). And they wanted and have worked, since the original court order, to return to the old way -- to return to the "neighborhood school." As this Court in Swann said (402 U.S. at 28):

> "...All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation...."

The trial court recognized in its original ruling (Appx. 129) that the neighborhood school concept is a valid one, but it also recognized that it cannot be used as a mask to hide the District's discrimination. This case should be viewed as though the motions for dissolution of the injunction and for relief from court supervision had been made in 1970, when the effort to overturn the court's order was made or when the recall was in progress. Just as it would have been improper for

---

[15] *Cf* . Doherty v. Wilson, 356 F.Supp. 35, 40 (MD Ga 1973): "A school board may fire, refuse to rehire or refuse to hire a teacher who has exercised constitutionally protected rights in such a manner as to seriously impair or destroy her effectiveness as a teacher."

the court then to have granted the motions and allowed the Board to go it on its own, so would it have been improper for the court to have done so now. In plain language, the trial court was correct in not trusting petitioners to carry out the mandate for desegregation (Appx. 459). It is as simple as that. It cannot be said that the court abused its discretion.

Petitioners' citation (Pet. Br. 19) of the Equal Educational Act of 1974, 20 U.S.C. 1701 *et seq.*, avails them nought. Aside from the fact that that act was passed (August 21, 1974) after the trial court's order herein (May 15, 1974, Appx. 452), it is axiomatic that Congress may not decree what shall or shall not be a denial of the equal protection of the laws. North Carolina Board of Education v. Swann (1971), 402 U.S. 43, 45-6. Even more pointedly, the very statutes petitioners rely upon point up their inapplicability here. Thus, 20 U.S.C. 1707 says: "*When* a court...*determines* that a school system *is* desegregated, or that it *meets* the constitutional requirements or that it *is* a unitary system, or that it *has no*

vestiges of a dual system, and *thereafter* residential shifts in the population occur which result in school population changes in any school within *such desegregated* system, such population changes so occurring shall not, *per se*, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan." (Emphasis added.)

None of the above conditions has occurred. No court[16] has determined that the Pasadena School System is desegregated, or that it meets constitutional requirements, or that it is a unitary system or that it has no vestiges of a dual system. And it is the school board herein that is seeking a new plan or a modification, not respondents. Indeed, petitioners are seeking to be completely free of judicial control. But by their conduct they have not yet achieved the status which would allow this. They have not "put their

---

[16]Nor even the dissenting judge in the court below (519 F.2d at 441).

shoulder to the wheel" (United States v. Greenwood Municipal Separate School District, *supra*, 406 F.2d 1086, 1093). The trial court was amply justified in pointing out (Appx. 458) how things might have been different had petitioners given the Pasadena Plan cooperation and support. And it was well warranted in its holding (Appx. 459) that to grant the Board relief, leaving it to its own decisions, would "surely be to sign the death warrant of the Pasadena Plan and its objectives."

Petitioners complain of "forced busing." (Pet. Br. 18; Appx. 273, 278, 281, 283, 285.) But in Swann, this Court said (402 U.S. at 430):

> "... [W]e find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school."

See also the companion Swann case, North Carolina Bd. of Educ. v. Swann (1971), 402 U.S. 43, striking down as unconstitutional a statutory prohibition against "involuntary bussing" "for the purpose of creating a balance or ratio of race."

Petitioners complain (Appx. 277) against "involuntary integration." But in McDaniel v. Barresi (1971), 402 U.S. 39, this Court approved just that.

In the light of all this, the trial court was amply warranted in its observation (Appx. 458) that petitioners' vocal and active resistance may be the whole tragedy of the claims of petitioners as to the inadequacy of the Pasadena Plan. Indeed, no matter what may be the ultimate distilling of this Court's statement in Keyes v. School District No. 1 (1973), 413 U.S. 189, 208, that "the differentiating factor between de jure segregation and so-called de facto segregation...is *purpose* or *intent* to segregate"[17] (emphasis in original), it must mean, at least, that school board members' views and statements may be inquired into. Accordingly, the trial court was well warranted -- indeed it had the duty -- in considering petitioners' views on "forced busing."

---

[17] *Cf.* Hart v. Community Sch. Bd. of Educ., 512 F.2d 37, 51 (CA 2 1975) with Higgins v. Bd. of Educ., 508 F.2d 779, 793, 797 (CA 6 1974).

C. The Trial Court Properly Disallowed The Free Choice Modification Proposed By Petitioners.

Petitioners continue to base their case on "hope" (Pet. Br. 20). They made no inquiry nor did they conduct any survey or study to present to the court so that it had information from which to judge whether the proposed plan would work (Appx. 492, 501). The Superintendent testified as to the superiority of the Pasaden Plan over the proposed plan (Appx. 529). The evidence showed, predictably, that the proposed plan would result in resegregation of the Pasadena School System to virtually the same status as when the case was first begun. (Appx. 224, 499-500, 529, 583, Rear Folio). For integration, the proposed plan would entail as much or more transportation than the Pasadena Plan (Appx. 492, 458), Accordingly, not only did the trial court not abuse its discretion in refusing to allow the proposed plan, but, we submit, had it been allowed, that would have been an abuse of discretion requiring reversal. Green v. Sch. Bd. of New Kent County (1968), 391 U.S. 430; Raney v. Bd. of Educ. (1968), 391 U.S. 443; Monroe v. Bd. of Commissioners (1968), 391 U.S. 450.

See also United States v. Midland Independent Sch. Dist., 519 F.2d 60 (CA 5 1975); Brinkman v. Gilligan, 503 F.2d 684 (CA 6 1974), and Morales v. Shannon, 516 F.2d 411 (CA 5 1975), *cert. den.* 44 L.W. 3356.

In Green v. County Board of New Kent County, Virginia (1968), 391 U.S. 430, this Court made perfectly clear that the "freedom of choice" plan proposed here is improper, just as was the freedom of choice plan in Green. In that case, the school board contended that it had fully discharged its obligation under Brown II "by adopting a plan by which every student, regardless of race, may 'freely' choose the school he will attend." 391 U.S. at 430. This, despite the fact that in operation, and even though there were but two schools in the system, no black students had applied to the "white" school and no white students had applied to the "black" school. Contrary to the position taken by the majority of the Board in the case at bar, that given free choice,[18] if the result is a segregated school system, they would be happy with it (Pl. Exh. XIX, p. 2, Rep. Tr. 173);

[18] Sugared up by "incentives to attend another school.

this Court would not countenance it. While it recognized that there may be problems in the dismantling of a former dual system, nevertheless the thrust of Brown II is that the school board is "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-38. "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." 391 U.S. at 439 (emphasis in original).

The "freedom of choice" plan simply would not do for it has shown by its operation that it results in a segregated system.[19]

This Court also found significant that the board in Kent County did not begin its desegregation efforts until eleven

[19] The experiences in New Kent County are significant for there, "there is no residential segregation; persons of both races reside throughout." 391 U.S. at 432. Nevertheless, the "neighborhood" concept in the milieu of a segregated system just did not work.

years after Brown I, ten years after Brown II. The record of the Board in the case at bar is even worse. It did not begin its efforts until 16 years after Brown I, 15 years after Brown II, and then only after prodding by the court's order.

In rejecting the "freedom of choice" plan in Green, the Court pointed out that "rather than further the dismantling of the dual system, the plan has operated simply to burden the children and the parents with a responsibility which Brown II placed squarely on the school board." 391 U.S. at 441-42.

In the companion case, Raney v. The Board of Education of the Gould School District (1968), 391 U.S. 443, the Court similarly found that the "freedom of choice" plan did not result in desegregation but only in segregation. Said the Court, at 447-48: "Our decision in Green ...establishes that the [freedom of choice] plan is inadequate to convert to a unitary nonracial school system.... [It] has operated simply to burden children and

their parents with a responsibility which Brown II placed squarely on the school board."

Nor does a variation on the same theme produce any different rule. In the third case decided by this Court on May 27, 1968, Monroe v. Board of Commissioners of the City of Jackson, Tenn., 391 U.S. 450, a "free transfer" plan was instituted under which a student was required to register in his "neighborhood" school after which he could "freely" transfer out. As could be anticipated, the result was neighborhood "black" and neighborhood "white" schools. This Court pointed out that the District Court had predicted that very result even before the institution of the plan. 391 U.S. at 457-58. And now, after the fact, the Court said (at 458-59), "the 'free-transfer' system has permitted the 'considerable number' of white or Negro students in at least two of the zones to return, at the implicit invitation of the Board,[20] to the comfortable security of the old, established

[20] *Cf.* the platforms, mentioned above, of the majority of the present Board in the instant

discriminatory pattern." As in Goss v. Bd. of Educ. of Knoxville (1973), 373 U.S. 683, 686, the "free transfer" system

---

case to Return to Neighborhood Schools (Appx. 286). This kind of official governmental encouragement has been recognized by this Court as being sufficient to require nullification under the Fourteenth Amendment of a seemingly neutral provision, as for example, Proposition 14 on the November 1964 California ballot which allowed a homeowner to sell or decline to sell his property to another person as he saw fit. Reitman v. Mulkey (1967), 387 U.S. 369. *Cf.* Professors Karst and Horowitz, "Emerging Nationwide Standards for School Desegregation -- Charlotte and Mobile, 1971," in 1 The Black Law Journal 206, 219 (1971): "Judge Wright [in Hobson v. Hansen, 269 F.Supp. 401 (D.C. 1967), *aff'd as modif. sub nom.* Smuck v. Hobson, 408 F.2d 175 (CA DC 1969)] spoke of the need to disabuse the entire community of the idea that black school children have been officially separated from whites in order to avoid the implication of an officially-imposed stigma of caste. When a school board deliberately chooses a plan that does not reduce racial imbalance, in the face of effective alternative plans that are reasonably available, the community is not so unsophisticated as to fail to notice, and to draw the conclusion that such a stigma has been officially imposed...." The result can only be the generating in the minority of the "feeling of inferiority as to their status in the community" so rightly condemned in Brown I (347 U.S. at 494). To paraphrase this Court in Wright v. Council of the City of Emporia (1972), 407 U.S. 451, 466: "the message of the action [would not escape] the Negro children in [Pasadena]."

"operates as a device to allow *resegregation* of the races to the extent desegregation would be achieved by geographically drawn zones." Monroe, *supra*, 391 U.S. at 459 (emphasis in original). The same is true in the case at bar.[21]

And in words written as though for this very case, the Court in Monroe said of the school board's argument:

> "...We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. 'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them' Brown II, at 300, 99 L Ed at 1106." *Ibid.*

In accord is Cooper v. Aaron (1958), 358 U.S. 1. There, the school board sought postponement of the requirement to desegregate the Little Rock, Arkansas schools because of the "violence," "chaos, bedlam and turmoil," "tension and unrest" which had been engendered. These, indeed, are weighty considerations, but said the Court, "law and order are not here to be preserved by depriving the Negro children of their constitutional rights." (Cooper v. Aaron, 358 U.S. at 16).

Mr. Justice Brennan, as individual justice in Keyes v. School District No. 1, *supra*, 396 U.S. 1215, pointed out the same rule. There, the Circuit Court had stayed an order of the District Court which had the effect of requiring the school board to partially implement a school desegregation plan prepared by the board, but later rescinded after a change in membership following a school board election. The Court of Appeals based its action on the fact that "a plan of desegregation 'must depend for its success on

---

[21] It is not without significance that the petitioners, or their supporters, point to the adoption by the California voters of Proposition 21 on the November 1972 ballot in justification. Appx. 283, 292. Indeed, that vote can be taken as an indicator that the proposed "freedom of choice" plan will operate to *resegregate* the district. This, however, as Green, *supra* (391 U.S. 430), and its companion cases show, the courts will not allow. (Prop. 21 added §1009.6 to the California Education Code. It read: "No public school student shall, because of his race, creed or color be assigned to or required to attend a particular school." The provision was declared unconstitutional by the California Supreme Court in Santa Barbara School District v. Superior Court (1975), 13 Cal.3d 315, 530 P.2d 605, 118 Cal.Rptr. 637.

the understanding cooperation of the people in the area.'"[22] In setting the Court of Appeals' stay aside, Mr. Justice Brennan said: "But the desirability of developing public support for a plan designed to redress de jure segregation cannot be justification for delay in the implementation of the plan." 396 U.S. at 1217. No more can it be justification for scuttling it.

In Davis v. Board of School Commissioners of Mobile County (1971), 402 U.S. 33, 37, this Court said:

> "...Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation."

This cannot be said to be the case of the plan petitioners have proposed, for it contemplates that "on the basis of providing parents with new options as to the type of education available, the ethnic balance at some sites may be altered from what it is at present." Appx. 462. This is a nice way of saying the schools will

---

[22] This is not unlike what petitioners are saying here.

be segregated. And the "option" offered to students to spend one-half a day a week in an integrated atmosphere (*ibid.*) is subject to the same disqualification as in Green, Raney, and Monroe, *supra*. The Board cannot thus abdicate its responsibility.[23]

No matter how sugar-coated the presentation,[24] petitioners' proposed plan is nothing other than a plain "freedom of choice" plan.[25] As to that, the words of

---

[23] This, over and above the obvious defect, both educationally and culturally, of a one-half dabble in integration. (Appx. 312, wherein the Superintendent stated he "did not believe ½ day a week would provide the opportunity for growth and development from young people to adults and contributing members to this community." And again, Appx. 526: "[T]hat particular aspect of the plan does not provide the kind of interchange among the different ethnic groups that I believe is worthwhile.")

[24] There is no reason why the "magnet" school concept (Appx. 460-61) cannot be employed under the Pasadena Plan (Appx. 457). Indeed, such programs are going on even now (Appx. 341-46). And in the mind of at least one of the proponents of petitioners' proposed plan (Dr. Myers), that concept is neither a practicality under the proposed plan nor of any particular significance (Appx. 304-05).

[25] It likewise, perhaps, embodies a "freedom of transfer" concept. See ¶[3] of the Proposed

the court below in another case, in affirming the rejection by a different District Court of a "freedom of choice" plan for Las Vegas in Kelly v. Guinn (1972), 456 F.2d 100, 108-9, *cert. den.* 413 U.S. 919, cannot be gainsaid:

> "'Freedom of choice' plans usually, if not invariably, fail to eliminate school segregation. Such plans rest upon the theory that the school district's entire obligation is to refrain from excluding any student from any school because of race. But once it is determined that a school district has contributed to the creation and maintenance of segregation, neutrality is no longer enough. Then the school district's duty is not limited to the removal of discriminatory bars to school integration; it is charged with an affirmative duty to eliminate

Plan (Appx. 462) where it is pointed out that "all students who are presently enrolled in our schools would be able to continue to attend the school that they now attend if the parents so choose or they would be free to choose from any other school within their zone."

> segregation.* 'Freedom of choice' plans operate 'simply to burden children and their parents with a responsibility which Brown II... placed squarely on the school Board.' [Citations.] The attempt to shift responsibility rarely works. The parents and children are either unable or unwilling to carry the burden.[26] Not surprisingly, they failed to do so in this instance.
>
> *"Nor is the duty limited 'to the correction of that portion of the segregation that might reasonably be attributable to past discrimination.' Once it has been established that 'past discrimination played some causal role in producing segregated patterns,' Swann requires 'the complete elimination of those patterns.' Fiss, The Charlotte-Mecklenburg Case, note 7, 38 Chi.L.Rev. at 705."

Nor is there any reason, much less showing, that it would work here.[27]

[26] *See generally* United States Commission on Civil Rights, Southern School Desegregation 1966-'67 (1967), at 45-69.

[27] Without purporting or attempting to be an exhaustive list, some of the other Court of Appeals cases which have disapproved "freedom of choice" plans are: Cato v. Parham, 403 F.2d 12 (CA 8 1968); Jackson v. The Marvel Sch. Dist. No. 22, 416 F.2d 380 (CA 8 1968); United States v. Lovett, 416 F.2d 386, 392 (CA 8 1969); United States v.

It is not a matter, as petitioners suggest (Pet. Br. 21) of racial balance or whether a "free choice" plan may ever be allowed. (Pet. Br. 22.) It is simply that the proposed plan would have resegregated the district, a situation which, despite petitioners' lack of concern about it (Pl. Exh. XIX, p. 2, Rep. Tr. 173; Appx. 500), would surely have been intolerable. For it is not to be forgotten that "the measure of any desegregation plan is its

---

Jefferson Co. Bd. of Educ., 417 F.2d 834, 836 (CA 5 1969); United States v. Choctaw Co. Bd. of Educ., 417 F.2d 838, 841 (CA 5 1969); Hilson v. Ouzts, 421 F.2d 632 (CA 5 1970); Boykins v. Fairfield Bd. of Educ., 421 F.2d 1330 (CA 5 1970); Steele v. The Bd. of Public Instruction of Leon County, 421 F.2d 1382 (CA 5 1970); United States v. The Bd. of Educ. of Baldwin County, 423 F.2d 1013 (CA 5 1970); Hall v. St. Helena Parish Sch. Bd., 424 F.2d 320 (CA 5 1970); Hilson v. Ouzts, 425 F.2d 219 (CA 5 1970); Clark v. Bd. of Educ. of Little Rock Sch. Dist., 426 F.2d 1035, 1043 (CA 8 1970), *cert. den.* 402 U.S. 952; United States v. Bd. of Educ. of Webster County, 431 F.2d 59 (CA 5 1970); United States v. Georgia, 466 F.2d 197, 199-200 (CA 7 1972). *See also* cases listed in 44 Modern Federal Practice Digest, 1975 Cumulative Ann. Pocket Parts, Key No. "Schools & School Districts" 154, p. 305, under the headnote: "If there are reasonably available other ways promising speedier and more effective conversion to a unitary nonracial school system, freedom of choice must be held unacceptable."

effectiveness." Davis v. Board of School Commissioners (1971), 402 U.S. 33, 37. Virtually identical plans proved ineffective in the two cities in California where they were tried, San Bernardino and Richmond. (Appx. 549.) Just as in Green and Raney, *supra*, where *not a single white child* chose to attend the "black" schools (391 U.S. at 441 and at 446), and as in Monroe, where *not a single white child* transferred to any "black" school (391 U.S. at 453), so was the experience in California. In both San Bernardino (Appx. 554) and Richmond (Appx. 556) were the plans marked by the *absence of even a single white student participant.* How, then, can the trial court be faulted?[28] And how is it even thinkable that the trial court should be compelled to allow such a plan? (Pet. Br. 20.) The answer, of course, is the trial court was correct and its judgment should not be disturbed.

---

[28] It was entirely appropriate, therefore, for the trial court to have noted in its opinion (Appx. 456-57):

Amicus curiae Chattanooga Board of Education apparently agrees, for it says (Br. 31): "there is a responsibility upon school boards to undertake an affirmative duty to desegregate; and an effort that is practical, honestly conceived, honestly implemented, and which has reasonable chances of accomplishing the desired goal." It being crystal clear that the proposed alternative plan of petitioners has no reasonable chance of success, petitioners in the instant case have not performed their duty. Where "the natural, probable and foreseeable consequence of [school board action] is to bring about or maintain segregation," such action cannot be permitted. United States v. School District of Omaha, 521 F.2d 530 (CA 5 1975), *cert. den.* 44 U.S. Law Week 3280; Milliken v. Bradley (1974), 418 U.S. 717, 725, 753.

> "What the Alternative Plan and its advocates--four of the present five Board members--offer is the hope that 'establishment of unique educational alternatives at each K-6 school site' and 'salesmanship' will convince enough 'white parents' whose children have left the Pasadena Unified School District to return *and choose* the same 'educational alternatives' that black parents do in order to accomplish an integrated school system. Hope may spring eternal, but realism exposes the folly of the belief that one who left a school district because his children were forced to attend schools with Negro children would now voluntarily choose that alternative.*
>
> *Presumably, these are the same white parents who helped elect Mr. Marcheschi, Dr. Vetterli, Dr. Meyers and Mr. Newton in response to the pampaign promise to 'Stop Forced Busing.'" (Emphasis in original.)

II

THIS CASE IS NOT MOOT

Hardly.

Scarcely a month ago (December 22, 1975), Mr. Justice Rehnquist granted a stay of an order of the District Court in this case, granted pursuant to a motion by plaintiffs and by presently attending students and their parents. The order of the District Court had required petitioners to restore a school to its status prior to petitioners' having taken action which the trial court found placed an undue burden on black students as distinguished from white, and was segregative. (Pasadena

City Bd. of Educ. v. Spangler, No. A-538 in this Court, October Term 1975.) In that order, Mr. Justice Rehnquist stated (p. 1, Order of Dec. 22, 1975) that while ordinarily he would have denied such a stay (The Circuit Court of Appeals had also denied it and the appeal from the order is pending before that Court, No. 75-3300 therein), he did so because of the granting of certiorari in the instant case and because one of the issues purportedly, as we say, presented is whether "'a unitary system which has been in compliance for four years remains subject indefinitely to the control of the trial court which entered the decree.'" As we have seen above, this question is not one which is properly before this Court. The Pasadena School System is not and has not been a unitary system. But be that as it may, that proceeding presented to Mr. Justice Rehnquist demonstrates that the Pasadena School Desegregation matter is far from moot and is, rather, the subject of a live, vigorous, even heated, if you will, controversy.

Also pending before the Court of Appeals below, No. 74-2530 therein, oral argument having already been had, is an appeal from another order by the District Court (384 F.Supp. 846) finding petitioners herein to have been in contempt of court for having appointed the assistant superintendents and the director of elementary curriculum without complying with the procedure therefor set out in the Pasadena Plan. *See* discussion of this matter, *supra*, page 20. In the proceeding, the trial court ordered the Board to undo its segregatory action. The contempt proceedings were likewise brought by presently attending students of the Pasadena Schools and their father.

Similarly demonstrating the viability of the controversy is the vigorous protest the students made to the Pasadena Board in regard to the Board's presenting its alternative plan (Appx. 308) to the trial court to modify the Pasadena Plan.[29]

---

[29]Typical is this statement by one student to the Board (Appx. 308) that "he had seen this sort of plan before and believed it was doomed to fail because it would result in Black mini schools in White areas and White mini schools in Black areas....that students had been working for the

Accordingly, the controversy is a live and vigorous one. Petitioners have not shown otherwise.

Moreover, this is a true class action; it was and is so considered by everyone. It can be nothing else. This is a school desegregation case in which an entire de jure school system was ordered desegregated. No one person or persons were ordered admitted to any particular school. *Cf.* Brown v. Board of Education (1955), 349 U.S. 294 at 301. The entire system was ordered changed. "By definition, discrimination on the basis of race or national origin is a class wrong." Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 50 (CA 5 1974). Until true desegregation has indeed been achieved, "the constant existence of a class of persons suffering the deprivation is certain." Gerstein v. Pugh (1975), 420 U.S. 103, 110, fn. 11. This is

---

Pasadena Plan for the past 3½ years and they will not be segregated." Another student told the Board (*ibid.*): "when he looked at the Plan a few hours ago, he thought it was a nice idea, but it was bad because in no way would parents living in the Willard area send their children to Lincoln and again, there would be segregated schools, and the students had a right to attend integrated schools."

precisely the kind of case that falls within the "capable of repetition yet evading review" principle. Moore v. Ogilvie (1969), 394 U.S. 814, 816; Storer v. Brown (1974), 415 U.S. 724, 737, n. 8; Sosna v. Iowa (1975), 419 U.S. 393, 402.

The mere absence of the verbalization of the words prescribed by Rule 23 cannot change the picture. In the first place, there is nothing jurisdictional about the pronouncement requirement of Rule 23. It is a rule of court, and as such, may be waived. Toglianetti v. United States (1969), 394 U.S. 316, n. 1. And, while, of course, the rules should be adhered to and followed, "it is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it." United States v. Breitling (1858), 20 How. (U.S.) 252, 15 L.ed. 900, 902. If need be, the interests of justice require it here. No purpose would be served by requiring the recitation of the words.

But the Court need not be concerned about that problem because this case was

treated by everyone, as it is, as a class action encompassing tne desegregation of the entire Pasadena School System. A brief history will demonstrate.

The original action started out as a class action brought by students and their parents "to desegregate the three public high schools in Pasadena, California, and was brought on behalf of the plaintiffs 'and of all similarly situated students enrolled in one of the three high schools.'" Spangler v. United States, 415 F.2d 1242, 1243 (CA 9 1969). The United States intervened under 42 U.S.C. 2000h-2 and "brought into the case the entire Pasadena School System," praying for "an injunction, enjoining the [school board members] from discrimination on the basis of race in the operation of the Pasadena School district." (*ibid.*) Upon motion, the trial court struck the allegations in the complaint in intervention concerning the elementary, junior high schools and special schools *(ibid.)*, thus leavings the case as involving only the high schools. The Government appealed and the Court of Appeals reversed,

ordering that the complaint in intervention be maintained as filed. (*Ibid.* at 1246.) This, because of the obligation of the Board "to achieve and maintain a unitary, non-racial system of education." (*Ibid.*) And that, of course, is how the case was tried. (Appx. 137-145, 174-180, 181-182, 196, 201-208, 219-220, 223-224, 225-227, 230-231.)

And so it is not surprising that in its findings of fact and conclusions of law at the end of the trial in 1970, the trial court said that there was "segregation in the student bodies and faculties of the Pasadena Unified School District at all levels, elementary schools, junior high schools, and senior high schools" (Appx. 97) and "time is of the essence in vindicating the right of *Pasadena's children* to obtain equal educational opportunities." 311 F.Supp. at 504 (emphasis added).

Similarly, on the appeal by other parents who were dissatisfied with the trial court's order requiring the desegregation of Pasadena schools and who had sought to intervene for the purpose of appealing it, the Court of Appeals said (427 F.2d 1352):

"The plaintiffs below are school children. Their suit is *a class action* brought to compel integration of the Pasadena schools ...." (Emphasis added.)

In their defense against the contempt proceeding referred to above, petitioners here resisted on the ground that "where, as here, representation of the class is adequate and compatible with the interest of the entire class, no individual member of the class may appear *in propria persona* to vindicate an alleged violation of class rights." 384 F.Supp. at 848 (underlining ours). Thus petitioners are in no position to complain because a *haec verba* recital that the action shall be maintained as a class action was not made.

And finally, the court below in this proceeding pointed out (519 F.2d at 430-31) that "this action was originally instituted on August 28, 1968, by certain Pasadena public school children and their parents as a class action against the Pasadena City Board of Education of the Pasadena Unified School District and certain officials

thereof, seeking injunctive relief from alleged unconstitutional segregation of its public schools. The United States Government, also endeavoring to eliminate the discrimination, was permitted to intervene as a party plaintiff on December 4, 1968. On January 23, 1970, after a nine-day trial, the District Court entered its Decree, enjoining the Board and the Superintendent of Schools 'from discriminating on the basis of race in the operation of the Pasadena Unified School District.'" (Emphasis added.)

It can not really be said, therefore, that the determination called for by Rule 23 was not made.[30] But even if, somehow, it can be said that the determination was not made and is still required, that does not make the matter moot. It will be recalled

---

[30] *See* Bing v. Roadway Express, Inc., 485 F. 2d 441, 447 (CA 5 1973): "The parties and the court believed that this was a class action. No objection was registered below. To say that this is not a class action would be to ignore the substance of the proceedings below in favor of an excessively formalistic adherence to the Federal Rules of Civil Procedure. We believe the trial court's implicit determination of the class action question satisfies Rule 23(c)(1)." *Accord:* Guerra v. Manchester Terminal Corp., 498 F.2d 641, 646 (CA 5 1974), fn. 4.

that in entering its judgment, the trial court, as the decisions of this Court say it should, Brown v. Board of Education (1955), 349 U.S. 294, 301; Raney v. Board of Education, *supra*, 391 U.S. at 449, "retained jurisdiction of this cause in order to continue to observe and evaluate the plans and the execution of the plans of the Pasadena Unified School District in regard to the hiring, promotion, and assignment of professional staff members, the construction and location of facilities, and the assignment of students." 311 F. Supp. at 505. To require the court to retain jurisdiction but not permit it to exercise it, would be a *non sequitur*. Because the court retained jurisdiction, there is not even yet a final judgment. This being the case, under the rule of flexibility which must be accorded Rule 23, the specific order can still be made. Jiminez v. Weinberger, 523 F.2d 689, 702 (CA 7 1975). Couple this with the fact that new named parties may be substituted in a class action even after the original named parties have long since departed, Rogers v. Paul (1965), 382 U.S. 198, 199, there is no basis for an argument that the case is moot.

Petitioners' reliance (Pet. Br. 24) on The Board of School Commissioners of the City of Indianapolis v. Jacobs (1975), 420 U.S. 128, is misplaced. That case was brought by six high school students involved in the publication of a student newspaper seeking an order, inter alia, enjoining the school authorities "from continuing to suppress and prohibit the distribution of the *Corn Cob Curtain*." Jacobs v. Bd. of Sch. Commissioners, 349 F.Supp. 605, 607. When they got that order, that was all they were entitled to. It was their right to free speech that was involved. Moreover, there was nothing in the record in Jacobs indicating that any other students planned to continue publication of the *Corn Cob Curtain* or any other underground paper, so there was no substantial likelihood that the problem would arise in the future. This is a far cry from a case--the instant one--which seeks to desegregate an entire school system in which it is obvious that the other students will continue to be subject to the deprivation of their constitutional rights irrespective of the graduation of the individual named plaintiffs.

That Jacobs is not as all-encompassing as petitioners would have it is seen from two Court of Appeals cases decided subsequent to it.

In Jimenez, *supra*, 523 F.2d at 697, fn. 14, the Seventh Circuit said:

> "We do not imply approval of the district court's failure to certify the class. That failure, like the inadequate compliance with Rule 23 in [Jacobs] created an unnecessary risk of mootness. Since there has never been any doubt in this proceeding about the existence of a live controversy between the real adversaries, the Jacobs problem is not presented here."

And in Cruz v. Hauck, 515 F.2d 322, 325, fn. 1 (1975), the Fifth Circuit said:

> "Cruz has been discharged and the record seems to indicate that the other individual plaintiffs are no longer confined in the Bexar County Jail. We have been unable to find any verification of this proceeding as a class action. The parties, however, have treated the litigation as though the district court made an appropriate certification. The defendants have not raised the issue of mootness and since the legal issues presented continue to affect the prisoners in jail, contrary to the situation in Board of School Commissioners v. Jacobs,... a case or controversy exists with respect to the validity of the rules at issue."

So, here. "Only permanent--demonstrably permanent--desegregation of the Schools would render this case moot." Singleton v. Board of Commissioners of State Institutions, 356 F.2d 771 (CA 5 1966). That stage--desegregation--has not yet been reached in Pasadena.

Nor are petitioners on sound ground in their argument concerning the United States. In the first place it is incorrect to say, as do petitioners (Pet. Br. 25), that its function in this litigation was purely ancillary to that of plaintiffs. Without denigrating the role played by plaintiffs or engaging in a mathematical exercise as to who did what, it is apparent that it is the United States which converted this case from a high school desegregation case to a system-wide desegregation case. 415 F.2d at 1246. The very argument petitioners make (Pet. Br. 25) without citation of authority, has already been rejected. Spangler v. United States, 415 F.2d 1242. At the beginning of this litigation, when the United States sought

to expand the scope of the proceeding to include all the other schools as well as the high schools, the trial court refused to allow it. That ruling was reversed on appeal (*ibid.*). It can hardly be said, therefore, that the "United States is not an adequate substitute for a real class." (Pet. Br. 25.)

Similarly incorrect is petitioners' argument (Pet. Br. 26) that the United States fares no better on a theory that it could have instituted the action. In the first place, petitioners are simply wrong in their assertion (*ibid.*) that the United States may not under Title IX of the Civil Rights Act of 1964 file an action "except on behalf of wronged individuals who could not secure adequate counsel in some other fashion." Petitioners cite no authority for this proposition. The only restrictions on the right of the United States to intervene under 42 U.S.C. 2000h-2 are that the application be timely and that the Attorney General certify that the case is of general public interest. As put by the Court of Appeals in holding that the United States must be allowed to intervene, the under-

~~ment to intervene under Title IX was broad~~

lying policy of 42 U.S.C. 2000h-2 "is to promote the strong public interest in obtaining compliance with the equal protection clause of the constitution" (415 F.2d at 1246). That public interest did not disappear with the graduation of the named individual plaintiffs here. Moreover, the Court of Appeals, citing ample authority, specifically held that the right of the Government to intervene under Title IX was broad indeed. Spangler, 415 F.2d at 1244. Furthermore, another section of Title IX, 42 U.S.C. 2000h-3, specifically does not restrict the United States' right to institute an action and, as the Court of Appeals pointed out (415 F.2d at 1244), under another provision of the 1964 Civil Rights Act, 42 U.S.C. 2000c-6, the United States could have initiated the lawsuit and ask for the complete relief it did in its intervention complaint.

Finally, in reply to petitioners' contention (Pet. Br. 26) that the Attorney General may not bring a desegregation case to secure relief "which would provide forced busing to effect racial balance,"

as the trial court, even before this Court's decision in 1971 in North Carolina Board of Education v. Swann, 402 U.S. 43, so correctly answered (Appx. 132):

> "That provision of 42 U.S.C. Sec. 2000c-6 relating to the power of courts and officials to require transportation of pupils to overcome racial imbalance in public schools must be construed to relate to so-called de facto or adventitious segregation. It is inapplicable in this case where the existing segregation of pupils and teachers is inseparable from the discriminatory practices and policies of the defendants. *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 878-86 (C.A. 5, 1966); *United States* v. *School District 151*, 404 F.2d 1125, 1130-32 (C.A. 7, 1968)."

This is quite in harmony with what this Court said in North Carolina Board v. Swann, 402 U.S. at 46:

> "...the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems."

The cause, therefore, is not moot.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

FRED OKRAND
JILL JAKES
MARK D. ROSENBAUM
MARY ELLEN GALE

Attorneys for Respondents Spangler, et al.